

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

July 12, 2013

Elisabeth A. Shumaker
Clerk of Court

CYPRUS FEDERAL CREDIT UNION,

Plaintiff–Appellant,

v.

CUMIS INSURANCE SOCIETY, INC.,

Defendant–Appellee.

No. 12-4145
(D.C. No. 2:10-CV-00550-DS)
(D. Utah)

ORDER AND JUDGMENT*

Before **BRISCOE**, Chief Judge, **KELLY** and **LUCERO**, Circuit Judges.

Cyprus Federal Credit Union (“Cyprus”) appeals from the district court’s grant of summary judgment in favor of CUMIS Insurance Society, Inc. (“CUMIS”). Cyprus sought coverage under a credit union bond issued by CUMIS for losses related to certain checks deposited by a Cyprus member. The district court concluded that the bond’s “Missing Endorsement” exclusion barred coverage for most of the checks at issue. It further concluded that Cyprus’ remaining losses were not covered based on the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 32.1.

“Uncollected Funds” exclusion, that several specific checks were not properly put at issue by Cyprus, and that Cyprus’ good faith and fair dealing claim failed as a matter of law. Although we agree with the latter determinations, we conclude that the “Missing Endorsement” exclusion, construed in favor of the insured under Utah law, does not apply on the facts presented. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in part, reverse in part, and remand for further proceedings.

I

In late 2007, Cyprus noted problems with two accounts held by Kirby Construction Incorporated, a company owned by Cyprus member Shawn Kirby. Kirby had deposited checks into his Cyprus accounts from his accounts at other banks that were returned for insufficient funds. A subsequent investigation by Cyprus revealed that Kirby had engaged in various forms of misconduct with respect to the Cyprus accounts over several months. Kirby obtained checks payable to various subcontractors, vendors, and suppliers, endorsed them in his own name, and deposited them into his Cyprus accounts. Kirby obtained at least some checks, it is unclear how many, by submitting fraudulent invoices from other companies to Cyprus’ Construction Loan Department. Cyprus eventually closed Kirby’s accounts.

Kirby later filed for Chapter 7 bankruptcy protection. Cyprus filed an adversary complaint in the bankruptcy case, asserting claims against Kirby for submitting fraudulent invoices, fraudulently depositing checks, forging endorsements, and conducting himself unlawfully as a contractor, all in violation of 11 U.S.C. § 523(a).

During the bankruptcy proceeding, Kirby asserted his Fifth Amendment right against self-incrimination when asked about joint-payee checks payable to Kirby and to Burton Lumber, one of the subcontractors involved in Kirby's scheme. Cyprus obtained a non-dischargeable judgment on its adversary claims by stipulation in the amount of \$497,788.23. According to an unsworn, undated statement from Joan Draney, an employee at Cyprus, Kirby admitted to her that he knew his conduct was illegal.

In August 2008, Cyprus filed a "Proof of Loss" with CUMIS, seeking coverage for losses related to the Kirby accounts under a credit union bond issued by CUMIS. Cyprus alleged that the losses were covered by the bond's "Fraudulent Deposit," "On Premises," and "Lack of Faithful Performance" provisions. CUMIS investigated the claim and concluded that coverage was unavailable because several of the bond's exclusions applied to the ninety-nine checks for which Cyprus claimed a loss. Cyprus then filed a complaint in state court against CUMIS asserting claims for breach of contract and breach of the covenant of good faith and fair dealing. CUMIS removed the case to federal court.

During discovery, Cyprus created a list of sixty-three checks for which it claimed a loss. Cyprus admitted in response to CUMIS' requests for admissions that these sixty-three checks were the only checks at issue in the case. Forty-seven of these checks were endorsed by Kirby but made payable to a different payee. Three checks were payable to Kirby or his company. Eleven of the checks were endorsed by the proper payee, but were not payable to Kirby. The remaining two checks were endorsed by Cyprus itself but

made out to another payee.

The parties filed cross motions for summary judgment. Cyprus also moved to strike portions of CUMIS' motion for summary judgment. In a brief order disposing of the motion to strike and the motions for summary judgment, the district court held that the "Missing Endorsement" exclusion in the credit union bond barred coverage for sixty of the sixty-three checks at issue. Cyprus moved to amend the judgment. After the district court denied that motion, the parties stipulated to the dismissal of claims relating to the remaining three checks. Cyprus timely appealed the judgment and the denial of the motion to amend.

II

We review the district court's grant of summary judgment de novo. Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1179 (10th Cir. 2009). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making this determination, "[w]e view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Weigel v. Broad, 544 F.3d 1143, 1151 (10th Cir. 2008) (quotation omitted).

We review the district court's denial of a motion to amend judgment for abuse of discretion. ClearOne Commc'ns, Inc. v. Biamp Sys., 653 F.3d 1163, 1178 (10th Cir. 2011). "A district court abuses its discretion if it made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. The abuse of discretion

standard includes review to determine that the discretion was not guided by erroneous legal conclusions.” Id. (quotation omitted).

The parties agree that the bond provisions at issue should be interpreted under Utah law. Utah courts generally interpret insurance policies as they do other contracts: “[I]f the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language.” Benjamin v. Amica Mut. Ins. Co., 140 P.3d 1210, 1213 (Utah 2006) (quotation omitted).

“Whether an ambiguity exists in a contract is a question of law.” Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272, 1274 (Utah 1993) (citations omitted). A contractual provision is ambiguous if it is “unclear, omits terms, or is capable of two or more plausible meanings.” S.W. Energy Corp. v. Cont’l Ins. Co. & Marine Office of Am. Corp., 974 P.2d 1239, 1242 (Utah 1999). If an insurance “policy is not ambiguous, no presumption in favor of the insured arises and the policy language is construed according to its usual and ordinary meaning.” Alf, 850 P.2d at 1274. If an insurance contract is ambiguous, however, Utah courts “interpret insurance policies liberally in favor of the insured.” Mellor v. Wasatch Crest Mut. Ins. Co., 201 P.3d 1004, 1009 (Utah 2009).

III

Cyprus contends that it is entitled to coverage under several separate provisions of the bond. For the reasons explained infra, we need only consider the “Fraudulent Deposit” section of the bond. That provision states:

We will pay you for your loss resulting directly from your member

depositing into a savings, checking or other depository account maintained by you an “item of deposit” that is ultimately not paid, providing that:

- a. Your member knowingly intended to deceive you and commit a fraud by depositing the ‘item of deposit’; and
- b. You made payment or extended credit against the ‘item of deposit.’

The bond defines “item of deposit” to include “[a] check, draft, share draft or money order.”

We conclude that Cyprus has created a material dispute of fact as to whether its loss resulting from forty-seven checks endorsed by Kirby but payable to others is covered. CUMIS does not contest the fact that Kirby deposited into his account dozens of checks made payable to others over the course of several months. There is no suggestion that Kirby had the permission of any of the payees. And Cyprus subsequently returned the funds corresponding to these checks to the proper payee or credited the bank upon which the checks were drawn, resulting in a loss to Cyprus because Kirby had dissipated the funds improperly deposited. CUMIS argues, however, that Cyprus has not shown that Kirby acted with fraudulent intent when depositing the forty-seven checks.

In determining the meaning of this provision, we look to the “usual and natural meaning of the words.” Mellor, 201 P.3d at 1009 (quotation omitted). To determine the usual meaning of words in an insurance contract, Utah courts often look to dictionaries. See, e.g., Hoffman v. Life Ins. Co., 669 P.2d 410, 416 (Utah 1983). “Fraud” is defined as “an instance or an act of trickery or deceit espe[cially] when involving misrepresentation:

an act of deluding.” Webster’s Third New International Dictionary 904 (1993).¹

CUMIS contends that evidence of Kirby’s subjective intent is lacking.

Challenging each piece of direct evidence put forth by Cyprus, it argues that the judgment Cyprus obtained in the adversary proceeding against Kirby is not necessarily based on an admission of fraud, that Kirby’s assertion of Fifth Amendment privilege was made in response to joint-payee checks that are not at issue in this case, and that Kirby’s admission that he knew his conduct was illegal is unsworn hearsay. Even if we accept CUMIS’ arguments as to these points, however, we think a reasonable juror could conclude that Kirby possessed fraudulent intent based on his conduct.

As Utah courts have recognized, “fraudulent intent is often difficult to prove by direct evidence. Because of this difficulty, fraudulent intent is often inferred based on the totality of the circumstances in a case.” Anderson v. Kriser, 266 P.3d 819, 825 (Utah 2011) (footnote omitted). Utah courts thus permit fact-finders to infer fraudulent intent “from the presence of certain indicia of fraud,” such as the timing of the act. See Dahnken, Inc. of Salt Lake City v. Wilmarth, 726 P.2d 420, 423 (Utah 1986) (inferring fraudulent intent from the conveyance of property at issue immediately prior to litigation). Moreover, the “existence of fraudulent intent is a factual question.” Wasatch Oil & Gas, L.L.C. v. Reott, 163 P.3d 713, 722 (Utah Ct. App. 2007) (quotations omitted).

The undisputed facts show that Kirby deposited numerous checks made payable to

¹ The Utah Uniform Commercial Code does not define fraud. See Utah Code §§ 70A-1a-201, 70A-3-103.

others and spent the funds credited to his account as a result of these improper deposits. A jury could reasonably conclude that Kirby knew it was improper to deposit checks made payable to others based on Kirby's extensive bank activity and common sense. See State v. Poole, 871 P.2d 531, 536 (Utah 1994) ("Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same" (quotation omitted)). Under Utah law, fraudulent intent may be inferred with respect to negotiable instruments based on the improper acts themselves under certain circumstances. See State v. Gonzalez, 822 P.2d 1214, 1216 (Utah 1991) ("purpose to defraud" may be inferred from "the act of completing [a forged] check" under reasonable doubt standard); State v. McCardell, 652 P.2d 942, 944 (Utah 1982) (possession of stolen checks relevant to the crime of forging an endorsement, because possession would "support an inference of [defendant's] knowledge of the fraud and intentional participation in the forgery").

Moreover, the frequency of Kirby's improper deposits suggests that they were not merely accidental. See Ogden Valley Trout & Resort Co. v. Lewis, 125 P. 687, 691 (Utah 1912) ("Where the fraudulent intent of a party in the performance of an act is in issue, proof of other similar fraudulent acts is relevant and admissible to establish his intent or motive in the performance of the act in question" (quotation omitted)). Benign intent might be the most natural explanation if a handful of checks made payable to another were deposited into Kirby's accounts, but forty-seven such checks suggests a scheme to defraud. We therefore hold that summary judgment would not be proper with

respect to Cyprus' loss resulting from the forty-seven checks made payable to another but endorsed by Kirby and deposited into Kirby's account. A reasonable fact-finder could conclude that these losses are covered under the "Fraudulent Deposit" section of the bond.

However, based on the record before us we cannot reach the same conclusion as to the thirteen other checks properly at issue in this appeal. Unlike the forty-seven checks signed by Kirby but made payable to others, nothing in the record regarding these thirteen checks suggests fraudulent intent: First, according to the list of checks prepared by Cyprus, eleven of the remaining thirteen checks were endorsed by the payee and two were endorsed by Cyprus itself. Second, a Cyprus witness testified at his deposition that Cyprus voluntarily issued these checks to satisfy unpaid subcontractors. Although this witness also stated that these checks were issued to replace checks fraudulently endorsed by Kirby and deposited into his account, Cyprus does not cite to any evidence in the record to explain specifically what occurred with respect to the original checks or what the loss to Cyprus was and we find no such evidence in the record. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024-25 (10th Cir. 1992) (to avoid summary judgment, "sufficient evidence (pertinent to the material issue) must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein" because "we will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury"). We conclude that any fraudulent intent on Kirby's part in relation to these

thirteen checks is not discernible from the record. Accordingly, we conclude that Cyprus has not created a material dispute of fact as to whether these thirteen checks are covered by under the “Fraudulent Deposit” provision.

IV

In addition to the “Fraudulent Deposit” coverage, Cyprus asserts that it is entitled to coverage under two other provisions of the bond. Having concluded that there is a dispute of material fact as to whether the “Fraudulent Deposit” coverage applies to forty-seven of the checks at issue, we need not address whether other coverage provisions may also be applicable to these checks. With respect to the thirteen checks for which Cyprus has not created a fact question on “Fraudulent Deposit” coverage, we conclude that the “Uncollected Funds” exclusion applies. We need not consider Cyprus’ arguments that other coverage provisions apply to these thirteen checks because the exclusion bars relief regardless. The “Uncollected Funds” exclusion does not apply to “Fraudulent Deposit” coverage which, we have determined, may apply to the forty-seven improper-payee checks. We also conclude that the remaining three bond exclusions asserted by CUMIS—the “Missing Endorsement,” “Insufficient Funds/Closed Account,” and “Check Cashing” exclusions—do not bar coverage for those forty-seven checks.

A

The “Uncollected Funds” exclusion states that CUMIS will not pay for:

Any loss resulting directly or indirectly from payments made or withdrawals from a depositor’s account involving deposits or credits that are returned, reversed, or otherwise ultimately not paid, for any reason,

including but not limited to “forgery” or any other fraud except as may be covered under:

a. Fraudulent Deposit Coverage

Under Utah law, “[a]n insurer may exclude from coverage certain losses by using language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided.” Alf, 850 P.2d at 1275 (quotation omitted). The insurer “bears the burden to prove [that the insured’s] claim falls within the policy exclusion.” Draughon v. CUNA Mut. Ins. Soc’y, 771 P.2d 1105, 1108 (Utah Ct. App. 1989).

We agree with CUMIS that the losses claimed in this case are included under the plain and ordinary meaning of the “Uncollected Funds” exclusion. In its opposition to CUMIS’ motion for summary judgment, Cyprus argued that the proper-payee checks “were issued following the earlier issuance of checks that were endorsed by Shawn Kirby and deposited into Mr. Kirby’s account.” Cyprus argued that it suffered a loss because it “gave Shawn Kirby credit for” those checks. In other words, Cyprus claims that it suffered a loss when it was forced to make payments to third parties because deposits entered into Kirby’s account were ultimately returned and the account lacked funds to cover those payments. This allegation falls squarely within the plain meaning of the uncollected funds exclusion: the losses “result[ed] directly or indirectly from payments made or withdrawals from a depositor’s account involving deposits or credits that are returned, reversed, or otherwise ultimately not paid, for any reason”

On appeal, Cyprus argues that the “Uncollected Funds” exclusion does not apply

because “[a]llowing Shawn Kirby to withdraw funds from the account or otherwise use the account was not the cause of the loss,” but rather the loss “resulted directly from its employees failing to follow policies which allowed improperly endorsed checks to be deposited into [Kirby’s] account.” This argument misses the mark. As Cyprus itself argued in the district court, the credit union suffered a loss because it credited Kirby’s account for deposits that were ultimately returned or otherwise not paid. Even if the failures of Cyprus employees directly caused the loss, the “Uncollected Funds” exclusion applies to any losses “directly or indirectly” resulting from “deposits or credits that are returned, reversed, or otherwise ultimately not paid, for any reason.”

The “Uncollected Funds” exclusion thus applies to the losses asserted by Cyprus. However, because the exclusion explicitly does not apply with respect to “Fraudulent Deposit” coverage, it does not bar Cyprus from collecting its losses from the forty-seven checks endorsed by but not payable to Kirby. The “Uncollected Funds” exclusion is fatal with respect to Cyprus’ losses related to the remaining thirteen checks.

B

We next reject the district court’s conclusion that the “Missing Endorsement” exclusion applies, concluding that the provision is ambiguous and therefore must be construed in favor of coverage. The district court agreed with CUMIS that the “Missing Endorsement” exclusion applies to the forty-seven checks endorsed by Kirby but not made payable to him. That provision excludes coverage for:

[a]ny loss resulting directly or indirectly from your accepting for deposit or

exchanging for cash an item which is missing an endorsement, except as may be covered under Employee or Director Dishonesty Coverage.

CUMIS argues that “missing an endorsement” means missing the endorsement of the payee. Cyprus argues that the “missing an endorsement” means that the check at issue is entirely missing a signature, and because the forty-seven checks each had some signature—although not that of the payee—the exclusion does not apply. We must first decide whether the exclusion is ambiguous or is “clearly and unmistakably” stated. See Alf, 850 P.2d at 1274-75 (citations omitted).

In support of its position, CUMIS points to two Utah cases that, it contends, suggest “missing endorsement” means lacking the endorsement of the payee. In Pingree National Bank of Ogden v. McFarland, 195 P. 313 (Utah 1921), the Utah Supreme Court considered whether a plaintiff bank had established that it was a holder in due course of a check endorsed by a party other than the payee. Id. at 315-16. The court held that the plaintiff had not proven it was a holder in due course:

The infirmity of the purported indorsement in this case is that it does not appear that the indorsement was made or the check delivered by the payee, or anyone having authority. For that reason it was no indorsement at all and renders the check subject to any defense appellant might have against it.

Id. at 316.²

In Check City, Inc. v. L & T Enterprises, 237 P.3d 910 (Utah Ct. App. 2010), plaintiff bank filed a negligence action under Utah Code § 70A-3-406(1), claiming that

² The terms “endorsement” and “indorsement” are interchangeable. See Webster’s Third New International Dictionary at 1154 (listing “indorse” as a variant of “endorse”).

the defendant failed to exercise ordinary care in cashing certain checks issued by the bank. Check City, 237 P.3d at 911. The checks at issue were made payable to a subcontractor and a supplier, but the back of the checks included only the subcontractor's business name and the signature of an employee of the subcontractor. Id. at 911 n.1. In discussing these signatures, the Utah Court of Appeals stated "the checks in this case were not altered or forged, but, instead, the indorsement of one of the joint payees was missing." Id. at 912. The court further noted that "[t]he UCC differentiates between forged indorsements and missing indorsements," and cited a Sixth Circuit case making this distinction in a case in which the "indorsements were not forged but were instead signed in a different name than that of the payee." Id. (citing John Hancock Fin. Servs., Inc. v. Old Kent Bank, 346 F.3d 727, 729, 731 (6th Cir. 2003)).

Cyprus counters these authorities with the Utah Code's definition of "indorsement," which is:

a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement.

Utah Code § 70A-3-204(1). Under Cyprus' reading of this statute, "an endorsement" refers to any signature "regardless of the intent of the signer" unless "other circumstances unambiguously indicate that the signature was made for a purpose other than

indorsement.” Id.³ Cyprus also points to the dictionary definition of “endorsement,” arguing that the common understanding of the word is to “inscribe one’s signature on a check, bill, or note.” Webster’s Third New International Dictionary at 749 (defining “endorsement” as “the act or process of writing on the back of a note, bill, or other written instrument”).

We conclude that the parties’ competing interpretations of the “Missing Endorsement” exclusion are both plausible and thus the exclusion is ambiguous. See S.W. Energy Corp., 974 P.2d at 1242. Because the provision is ambiguous, it must be construed in favor of the insured. See Mellor, 201 P.3d at 1009; see also Alf, 850 P.2d at 1275 (insurer bears burden of “clearly and unmistakably communicate[ing] to the insured the specific circumstances under which the expected coverage will not be provided” pursuant to an exclusion (quotation omitted)).

We are not persuaded by CUMIS’ reliance on McFarland and Check City to establish that the signature of someone other than the payee on the back of a check is unambiguously a “missing endorsement.” CUMIS asserts that the checks at issue in Check City were written out to two payees, and contained two signatures, one of a payee and one of a non-payee. However, the opinion makes clear that there were not two signatures on the checks: “Although the reverse side of the checks contained what at

³ Notably, under neighboring provisions of the Utah Code, “special [e]ndorsement,” “blank [e]ndorsement,” and “anomalous [e]ndorsement” are defined, but the code does not define “missing endorsement.” § 70A-3-205. None of the defined terms relates to a signature by someone other than the payee. See id.

cursory glance might appear to be two signatures, even minimal attention to those signatures shows they are the subcontractor's business name and the signature of a presumably authorized employee, albeit in an order that is the opposite of what is customary.” Check City, 237 P.3d at 911 n.1. The Check City opinion thus concerns a situation in which the signature of one of the payees was “missing” in the sense urged by Cyprus—a required signature was not replaced by some other signature but was wholly absent.⁴

In McFarland, the court stated “it does not appear that the indorsement was made or the check delivered by the payee” and thus “it was no indorsement at all.” 195 P. at 316. However, it seems that the court meant that the signature was “no indorsement at all” in the figurative sense that the signature of a non-payee is irrelevant in determining holder-in-due-course status. Otherwise, the court's prior, multiple references to the signature as an “indorsement” would be nonsensical. See id. at 315-16.

As CUMIS notes, the Check City court arguably cites John Hancock Financial Services, 346 F.3d 727, as involving a missing endorsement even though—as here—the checks at issue in John Hancock contained the signature of someone other than the payee. See id. at 729. And some courts outside of Utah have used the phrase “missing

⁴ Another case cited by CUMIS, Pacific Metals Co., Division of A. M. Castle & Co. v. Tracy-Collins Bank & Trust Co., 446 P.2d 303 (Utah 1968), similarly involves a joint-payee check signed by a single payee. Id. at 304. In both cases, the checks at issue are thus “missing an endorsement” because the check holds one fewer signature than should have been required, consistent with Cyprus' interpretation of the exclusion.

endorsement” when discussing checks signed by a non-payee. See Jones v. Wells Fargo Bank, N.A., 666 F.3d 955, 961 (5th Cir. 2012) (“A depository bank warrants to a payor bank to which a missing endorsement check is presented for payment that it was entitled to enforce the draft on behalf of a person entitled to enforce the draft. Thus, a depository bank is liable for conversion as a matter of law when it accepts for deposit into a third party’s account checks that were not endorsed in the name of the payee.”); Nat’l Credit Union Admin. v. Mich. Nat’l Bank, 771 F.2d 154, 156 (6th Cir. 1985) (“With respect to the sixty-five checks made out to real payees [but signed by a non-payee], the Credit Union Administration invokes the general rule that a drawee bank is liable for paying an item with a missing indorsement because the item is not ‘properly payable.’”).

However, these cases, at best, establish the proposition that CUMIS’ interpretation of the phrase “missing an endorsement” is a plausible one; they do not suggest that Cyprus’ interpretation is not equally plausible. Further, it seems more probable that these cases simply used “missing endorsement” as convenient shorthand for missing a necessary endorsement. See Jones, 666 F.3 at 961 (noting two sentences prior to the above-quoted language that “a depository bank is liable for conversion if it obtains payment on an instrument that is missing a necessary endorsement” (emphasis omitted)); Nat’l Credit Union Admin., 771 F.2d at 156 (noting three sentences after the above quoted language “that a transferee of a check becomes a holder by negotiation which, in the case of a check made payable to order, is accomplished by delivery with any necessary indorsement” (quotation omitted)).

In any event, we conclude that these authorities, which do not deal with insurance coverage, are not controlling because Cyprus' proffered interpretation is consistent with the ordinary meaning of "missing an endorsement."⁵ This phrase could reasonably be construed by the "average, reasonable purchaser of insurance" as meaning that a payee's signature is absent rather than indicating that a check is signed by someone other than the payee. See Draughon, 771 P.2d at 1108 ("[A]n insurance policy must be read using the ordinary language of the average layman rather than by using technical medical, legal, insurance or statutory terms." (citation omitted)). And although we stress that ordinary meaning is paramount, Cyprus' interpretation also appears consistent with the broad definition provided in the Utah Code. See Utah Code § 70A-3-204(1) (defining "indorsement" as "a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument" (emphasis added)).

CUMIS bore the burden of "clearly and unmistakably communicat[ing] to the

⁵ The dissent suggests that Cyprus employees acted negligently in failing to verify that the signature on the checks matched that of the payee. Dissenting Op. at 3. However, the question before us is not whether Cyprus was negligent; insurance frequently covers negligent acts. Nor must we determine whether banks are best positioned to ensure a check is properly endorsed. Rather, the question for our court is whether CUMIS met its burden as insurer of "clearly and unmistakably communicate[ing] to the insured the specific circumstances under which the expected coverage will not be provided." Alf, 850 P.2d at 1275 (quotation omitted). Keeping our limited role in mind, we must ask "would the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words." Mellor, 201 P.3d at 1008. We conclude it would not.

insured the specific circumstances under which the expected coverage will not be provided.” Alf, 850 P.2d at 1275 (quotation omitted). We conclude that the plain and ordinary meaning of the phrase “missing an endorsement” is susceptible to both interpretations proffered by the parties. Accordingly, we reverse the district court’s conclusion that the “Missing Endorsement” exclusion applies to the forty-seven checks that were endorsed by Kirby but made out to another payee.

C

CUMIS next argues that the “Insufficient Funds/Closed Account” exclusion bars coverage. This provision excludes coverage for:

Any loss resulting directly or indirectly from:

- a. Any payment made or withdrawal from an account which results in a negative account balance if such transaction was or would be posted; or
- b. Any payment made or withdrawal from, involving or related to an account that:
 - 1) Had insufficient funds;
 - 2) Is nonexistent; or
 - 3) Is closed

CUMIS contends that the vast majority of Cyprus’ losses occurred when Kirby’s accounts had a negative balance or had been closed and thus the “Insufficient Funds/Closed Account” exclusion applies. We disagree.

We look to the plain meaning of the contract terms “payment made or withdrawal from an account which results in a negative account balance . . . or . . . an account that [h]ad insufficient funds . . . or [i]s closed.” We read this provision to exclude from

coverage losses incurred as a result of Cyprus allowing a member to make payments or withdraw funds from an account with insufficient funds or from a closed account. Kirby improperly deposited checks into his account at Cyprus and withdrew those funds, but the record does not demonstrate that the deposits had already been removed from his accounts at the time he made the withdrawals.

CUMIS points to an account statement showing that one of Kirby's accounts had a negative balance from February 21, 2008 forward, during which time the account balance plunged to negative \$484,806.99. But these checks represent payments made by Cyprus to repay third parties whose funds had been improperly deposited into Kirby's accounts. As explained in the deposition of Cyprus employee Jessica VanWagenen, these funds were not actually paid or withdrawn from Kirby's account (and certainly not by Kirby or any authorized signer on the account); instead, these transactions show Cyprus using "its own money" to repay parties to whom the credit union was legally obligated as a result of Kirby's fraudulent deposits. It seems clear that the account statement cited by CUMIS merely served a recordkeeping function.

We also disagree with CUMIS' assertion that the claimed losses occurred only when Cyprus repaid the third parties whose funds had been improperly deposited into Kirby's account. Under Utah insurance law, courts "treat[] the event triggering coverage as being the loss," rather than the date of "a tort judgment or settlement." Olah v. Baird (In re Baird), 567 F.3d 1207, 1214 (10th Cir. 2009). Accordingly, the losses at issue occurred when Kirby deposited checks payable to others and withdrew the funds

improperly credited to his account. The record before us does not permit conclusions of law as to whether Kirby's account had a negative balance when these events occurred, and thus CUMIS is not entitled to summary judgment based on the "Insufficient Funds/Closed Account" exclusion.

D

CUMIS also argues that the "Check Cashing" exclusion bars coverage. That exclusion exempts from coverage:

Any loss resulting directly or indirectly from "items of deposit," or paper of any kind, that you exchanged for cash which are returned, reversed, or ultimately not paid, for any reason, including but not limited to 'forgery' or any other fraud except as may be covered under:

a. Fraudulent Deposit Coverage

Because this exclusion explicitly does not apply to "Fraudulent Deposit" coverage and we have determined that the "Fraudulent Deposit" coverage applies to the forty-seven improper endorsement checks, we conclude that this exclusion does not apply.

V

Cyprus also argues that the district court erred in granting summary judgment in favor of CUMIS because CUMIS breached the implied covenant of good faith and fair dealing. However, Cyprus provides only a two-sentence, conclusory argument in its opening brief, devoid of legal and record citations. We therefore conclude that this argument has been waived. See Harsco Corp. v. Renner, 475 F.3d 1179, 1190 (10th Cir. 2007) ("[A] party waives those arguments that its opening brief inadequately

addresses.”).

VI

Finally, Cyprus argues that the district court erred in granting summary judgment in favor of CUMIS because several other checks should not have been subject to the district court’s missing endorsement ruling. These are checks numbered 138, 1027, 1028, 1031, 1032, 1033, and 1034. Check number 1034 is among the checks endorsed by but not payable to Kirby. We have already concluded that coverage for this check is subject to “Fraudulent Deposit” coverage and not barred by the other exclusions and need not address it further.

Cyprus first identified the remaining six checks in its motion to amend the summary judgment ruling. The district court determined that these checks were not properly at issue because they were not identified by Cyprus in its list of sixty-three checks that, as Cyprus conceded in response to a request for admission, were the only checks at issue in the case. We hold that the district court did not abuse its discretion in denying Cyprus’ motion to amend judgment with respect to these six checks. See Fed. R. Civ. P. 36(b) (“A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended.”).

VII

We conclude that summary judgment was improper with respect to the losses stemming from the forty-seven checks endorsed by Kirby but made payable to another, but that CUMIS was entitled to summary judgment as to the remaining checks at issue.

Accordingly, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings consistent with this order and judgment.

Entered for the Court

Carlos F. Lucero
Circuit Judge

No. 12-4145, Cyprus Federal Credit Union v. CUMIS Insurance Co.

KELLY, Circuit Judge, concurring in part and dissenting in part.

While I agree with much of the court's order and judgment, I would affirm the district court's conclusion that the "Missing Endorsement" exclusion applies to the forty-seven checks where the endorsement of the payee is missing. This court's conclusion, that the exclusion could encompass only situations where endorsement is wholly absent and is therefore ambiguous, is implausible and too far from commercial reality.

The importance of endorsement is captured in the phrase "Know Your Endorser."¹ As every teller is instructed, before depositing or cashing a check, one should inspect the endorser's identification and ensure that it matches the payee. See, e.g., Aplt. App., Vol. I at 150 ("The credit union policy requires that the elements of negotiability be verified A proper endorsement on the back of the check is required."); Joan German-Grapes, The Teller's Handbook 158 (6th ed. 1997) ("The teller is responsible for verifying that every check is properly endorsed."); Identity Theft Fraud Prevention Practices, II-5 (Apr. 2007), <http://www.cumis.com/cumis/media/00005011.pdf> ("All cheques should be

¹ In 1937, the United States Secret Service launched a Know Your Endorser campaign in an attempt to curb check forgeries and fraud. See Secret Service Warns Against Mailbox Thieves, 60 Banking L.J. 1053, 1053–54 (1943). The phrase is still used. See Debit Cards and Unsolicited Loan Checks: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the Comm. on Banking and Fin. Servs., 105th Cong. 119 (1997) (statement of H. Randolph Lively, Jr., President and CEO, American Financial Services Association) ("We're all familiar with the phrase: 'Know your endorser.'").

reviewed for . . . the payee name matching the endorsement.”). Ensuring that the endorsement is proper (in the name of the payee) and genuine (not forged) are critical given the importance of endorsement—it makes order paper negotiable. See Utah Code Ann. § 70A-3-201(1). Yet the court ignores all of this in holding that the “Missing Endorsement” exception does not apply when there is *some* endorsement on the check even if that endorsement does not match the name of the payee. Carried to its logical conclusion, a paw print on the back of a check would suffice.

Cyprus’s credit union bond, issued by CUMIS, excludes coverage for “[a]ny loss resulting directly or indirectly from [Cyprus] accepting for deposit or exchanging for cash an item which is missing an endorsement.” Aplt. App., Vol. I at 123. The court concludes that this “Missing Endorsement” exception is ambiguous, and thus construes the exception in favor of the insured, Cyprus. But there is nothing ambiguous about the exception—Cyprus’s proposed reading is implausible. See Saleh v. Farmers Ins. Exch., 133 P.3d 428, 433 (Utah 2006) (“[W]ords and phrases do not qualify as ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests.”). Cyprus’s construction of the exclusion suggests that a depository bank has no obligation to verify that an endorsement on the back of a check matches the payee, an utterly untenable commercial position that no insurer would fathom.

Consider the cases which have held that the failure to verify a check is properly endorsed constitutes negligent conduct on the part of the bank. See, e.g., N.J. Steel Corp. v. Warburton, 655 A.2d 1382, 1388 (N.J. 1995); Cody P. v. Bank of Am., N.A., 720 S.E.2d 473, 479 (S.C. Ct. App. 2011). There can be no question that “a depositary bank ‘has a duty to determine the identity of the payee’ of its depositor’s checks.” N.J. Steel, 655 A.2d at 1387 (quoting Hanover Ins. Cos. v. Bhd. State Bank, 482 F. Supp. 501, 505 (D. Kan. 1979)). In collecting on the instrument, the depositary bank warrants that there are no unauthorized or missing endorsements. See Utah Code Ann, §§ 70A-4-207(1)(a) & (b) (transfer warranties); 70A-4-208(1)(a) (presentment warranties). As a practical matter, the loss due to an improper endorsement falls on the party taking up the instrument because such an endorsement cannot transfer title.

We need look no further than Utah law itself for the precedent that an improper indorsement is “no indorsement at all.” Pingree Nat’l Bank of Ogden v. McFarland, 195 P. 313, 316 (Utah 1921). The court labors to distinguish McFarland, along with other Utah cases, in an attempt to label Cyprus’s reading of the exception plausible. But it is not persuasive. The court’s approach fails to recognize the critical role of the depositary bank in matching the payee to the endorsement and in guaranteeing the endorsement. The depositary bank is the first (and best) line of defense to make sure that only properly endorsed checks are cashed or deposited.

The court would have the insurer operate where a teller need only find *something* scribbled on the back of the check, even though that scribble is an improper endorsement. But this cannot be enough. Even the checks indicate that more is required: the back of certain checks include the phrase “Payee’s Endorsement” under the endorsement line. See Aplt. App., Vol. II at 389–92. Accordingly, I respectfully dissent on this issue.